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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~92~~ 87

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 16, 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 931

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. AND WEST KENTUCKY COAL COMPANY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

At page 15 of their brief in opposition, respondents argue that "the applicability of Section 3 does not depend upon whether the seller is 'dominant'", citing this Court's statement in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949), that in that case the seller did not have a "dominant position" in the market (337 U. S. at 302).

We submit that respondents are seeking to apply the quotation from this Court's opinion in *Standard Oil* out of context. As we read the opinion, the reference to Standard's lack of market dominance was made only in relation to the Court's consideration of the qualifying clause of Section 3. Prior to that case, it had frequently

been suggested that the test of whether or not particular exclusive dealing or tying contracts might "substantially lessen competition or tend to create a monopoly" depended upon the "domination of the market" by the seller (337 U. S. at 301). In *Standard Oil* this Court concluded that even though "we may assume • • • that Standard does not by itself dominate the market" (337 U. S. at 309), the proportion of sales in that market controlled by it and its leading competitors through requirements contracts was such as to bring the case within the qualifying clause of Section 3.

All of this has nothing to do with our contention that a contract cannot violate Section 3 when concededly the seller had no such economic leverage as to enable it to impose an exclusive dealing condition on the buyer. On that issue, it is plain from Mr. Justice Frankfurter's dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953), that *Standard Oil* supports, rather than refutes, our contention:

> "The obvious bargaining power of the seller [in *Standard Oil*] *vis-à-vis* the retailer does not, so far as we are advised, have a parallel here. • • • In any event, in the *Standard Oil* case we recognized the discrepancy in bargaining power • • •."

Respondents repeatedly complain that in our petition we neglected to comment on the recent decision of this Court in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959). We are happy to repair the omission. In our judgment, that decision squarely supports our contention that a statute such as Section 3 does not invalidate a contract as against a buyer, even though the seller may have violated the section

by entering into it. We suggest also that the present case well illustrates the statement of this Court that:

> "• • • If the defense of illegality is to be allowed as a collateral method of enforcement of the anti-trust laws, as the breadth of the petitioner's [respondents'] argument suggests, it must be said that his theory creates a very strange class of private attorneys general" (358 U. S. at 520).

Respectfully submitted,

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